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In The

Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, *et al.*,

Petitioners,

v.

KELLY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE IDAHO CONSERVATION LEAGUE AND THE LOUISIANA ENVIRONMENTAL ACTION NETWORK IN SUPPORT OF NEITHER SIDE

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INTERESTS OF *AMICI CURIAE*

Amici curiae are environmental organizations which participate in litigation in the state courts. *Amici* have an interest in this case because the judicial election systems in some states threaten to undermine their rights and the rights of their members under the Due Process Clause to fair and impartial justice. (*Amici* and their interests in state judicial elections are set forth in greater detail in the appendix).[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

> "Independence means you decide according to the law and the facts. Law and facts do not include deciding according to campaign contributions. And if that's what people think, that threatens the institution of the judiciary. To threaten the institution is to threaten fair administration of justice and protection of liberty."
>
> Justice Stephen Breyer[2]

The First Amendment issues in this case, though unquestionably important, illuminate only a narrow aspect of a larger problem: the extreme politicization of

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[1] Counsel for the parties have consented to the filing of this brief, as indicated in a letter lodged with the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the *amici* and their counsel, made a monetary contribution to the brief's preparation or submission. *See* Rule 37.

[2] Frontline: Justice for Sale (PBS television broadcast, November 23, 1999).

the elected state judicial systems and the fundamental due process issue that this relatively new political phenomenon creates. *Amici* submit this brief in an effort to assist the Court in evaluating the larger historical, political, and legal contexts from which this case arises.

Over the last several decades, and especially in the last few years, judicial elections in a number of states have become indistinguishable from the rest of the American political process, complete with large campaign contributions, "independent expenditures" by special-interest groups, raucous personal and partisan attacks on candidates, and massive television and print advertising. The high cost of judicial campaigns has created the widespread public belief that "justice is for sale," undermining both the state courts as institutions and the impartial administration of justice. A recent development of particular concern to *amici* is the nationwide campaign by certain elements of the business community to alter the composition of the state courts with the express goal of altering the law on, among other subjects, the environment. In several recent high-profile environmental cases, the evidence strongly supports the inference that the outcomes were determined by aggressive electoral political activity, rather than by the law or the facts in the particular cases.

The *amici* take no position on the First Amendment issues in this case. Nonetheless, the evidence presented in this brief relating to the politicization of the state court systems may be relevant to the resolution of these issues. Restrictions on speech and political activity must serve a "compelling" purpose and must be "narrowly tailored"

to achieve the stated purpose. Protecting judicial independence and impartiality is unquestionably a compelling purpose. But there appears to be a substantial question in many states, including Minnesota, whether regulating speech and other political activities of judicial candidates can actually achieve this purpose. Given that judicial independence and impartiality already are severely compromised by other types of political activity, it is debatable whether these important judicial attributes can be preserved by restrictions which focus narrowly on candidates' speech and political activities. In addition, it is also debatable whether restrictions on speech and political activity by judicial candidates can meet the requirement that restrictions on First Amendment freedoms be narrowly tailored. Like some other states and the federal government, Minnesota could adopt the appointive, "merit selection" approach, which would protect the independence and impartiality of the courts, without the need to restrict First Amendment freedoms.

Finally, the more fundamental constitutional issue raised by this case is whether the selection of judges at the ballot box, especially in light of the relatively recent, extreme politicization of judicial election contests, comports with the requirements of due process under the Fourteenth Amendment. The Court has repeatedly and jealously guarded the rights of litigants to impartial courts under the Due Process Clause. Before a citizen can be deprived of a protected interest, he or she is entitled to a judge who is not in a situation which will offer a "possible temptation" which would lead the judge "not to hold the balance nice, clear, and true." In enforcing this guarantee, the Court has emphasized that the appearance

of impartial justice is just as important as the reality. Increasingly, the elected courts in many states do not meet this constitutional standard. The Court should take this opportunity to sound the alarm about the increasingly fragile justice system in many state courts.

ARGUMENT

I. Special Interests Engage in Extensive Political Activity in State Judicial Elections In Order to Influence the Outcome of State Court Cases and to Change the Content of the Law.

A. The Politicization of the State Judicial Electoral Process.

Judges stand for election of some type in thirty-nine states.[3] Partisan elections are conducted in sixteen states; nonpartisan elections are held in seventeen states; and twenty states hold "retention" elections in which sitting judges are on the ballot seeking "yes" votes for another term but there is no direct opponent. In other states, the governor appoints judges; and in yet others the governor appoints judges with the concurrence of the legislative branch, as in the federal system.

[3] *See* 2 ABA Task Force on Lawyers' Political Contributions, Report and Recommendations Regarding Contributions to Judges and Judicial Candidates 7 (1998); *see also* John D. Echeverria, "Changing the Rules By Changing the Players: The Environmental Issue in State Judicial Elections," 9 N.Y.U. ENVTL. L. REV. 217, 302-03 Appendix (2001) (updating ABA data for Arkansas and Idaho).

Elected state judiciaries are generally viewed as a product of nineteenth century Americans' enthusiasm for direct democracy. "The concept of an elected judiciary emerged during the Jacksonian era as part of a larger movement aimed at democratizing the political process in America. It was spearheaded by reformers who contended that the concept of an elitist judiciary . . . did not square with the ideology of government under popular control."[4] As a result, a number of states converted to an electoral process, and between 1846 and 1912 every new state that joined the union established an elected judiciary.

In the past, by tradition if not by law, state judicial elections were relatively low key.[5] Campaigns were inexpensive, candidates did not solicit campaign contributions from those who might appear before the courts, and candidates avoided discussions of how they might rule on particular legal issues. Independent groups, with the exception of the state bar associations, did not participate in any meaningful fashion. For better or for worse, judicial elections were largely devoid of substantive content. Elections, when they were contested at all, were generally determined by the candidates' public reputations, the public's familiarity with the candidates, or even the attractiveness of a candidate's name.

[4] Philip L. DuBois, FROM BALLOT TO BENCH, JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 3 (1980).

[5] *See generally* UNCERTAIN JUSTICE: POLITICS AND AMERICA'S COURTS; THE REPORTS OF CITIZENS FOR INDEPENDENT COURTS 87-88 (1999).

Today, unfortunately, state judicial elections are essentially indistinguishable from the rest of the American political process, complete with large campaign contributions, "independent expenditures," raucous personal and partisan attacks on candidates, and massive television and print advertising. Special interest participants in the process include law firms, associations of trial lawyers, labor unions, state chambers of commerce, and many others. For some groups, participation in the judicial electoral process is simply an extension of traditional political activity focusing on the legislative and executive branches.

The state judiciary represents the last, disappearing frontier in terms of big-money influence in American politics. The cost of judicial campaigns has increased at a gallop; according to a 1998 report, judicial campaign costs for the Wisconsin Supreme Court increased by 800% since 1979, and judicial election costs increased by the same factor in Alabama since 1986.[6] In November 2000, during the last major round of state elections, expenditures reached a new all time high, especially by "independent" special interests. According to one estimate, entities other than candidates (including political parties) spent over $16,000,000 in the five states with the most expensive elections: Alabama, Illinois, Michigan, Mississippi, and Ohio.[7]

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[6] *See* Kyle Johnson, "Raising Money: Judges on the Campaign Trail," CHRISTIAN SCIENCE MONITOR, at A1 (August 13, 1998).

[7] *See* Roy A. Schotland, "Financing Judicial Elections," in FINANCING THE 2000 ELECTIONS (Magleby, ed., Brookings, forthcoming).

The high cost and contentiousness of many judicial elections has fostered the widespread belief that "justice is for sale" in many states. A recent national public opinion survey found that eighty-one percent of respondents believed that "[j]udges decisions are influenced by political considerations," and that seventy-eight percent believe "[e]lected judges are influenced by having to raise campaign funds."[8] These national survey results are confirmed by supportive data from numerous state-level surveys.[9]

Even before the recent, extreme politicization of the judicial electoral process, professional and academic opinion had turned against the concept of an elected judiciary. The American Bar Association has long favored moving towards merit appointment systems and otherwise limiting special-interest influence over judicial selection.[10] The American Judicature Society was originally established principally to pursue merit appointment.[11] This platform is based on the viewpoint that an electoral process is inherently political and that elections therefore necessarily undermine the independence and impartiality

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[8] *See* National Center for State Courts, How the Public Views the State Courts 41-42 (May 14, 1999).

[9] *See* Anthony Champagne, "Interest Groups and Judicial Elections," 34 LOY.L.A.L.REV. 1391, 1408 (2001) (collecting state polling data).

[10] *See generally* 2 ABA Task Force on Lawyers' Political Contributions, Report and Recommendations Regarding Contributions to Judges and Judicial Candidates (1998).

[11] *See* American Judicature Society, Judicial Selection, at http://www.ajs.org/select.html.

of the courts. Notwithstanding this thinking, the judicial electoral process remains a robust institution in most states. Many reformers, discouraged at the prospect of eliminating state judicial elections through the political process, have turned to various "second best" solutions, such as increasing the transparency of election financing, promoting public funding of judicial elections, or (as illustrated by this case) controlling direct political advocacy by candidates for judicial office.

B. Business Community Efforts To Influence Judicial Elections.

In the last several years, elements of the business community have mounted a concerted campaign to influence the outcomes of state judicial races in order to change the content of state law on issues of importance to business. Environmental law has been at the forefront of this new effort.

The Oklahoma Group.[12] A group of Oklahoma-based lobbyists, lawyers and business people, many with close connections to Koch Industries, a large privately-held company with major interests in petrochemicals, was the initial leader of the effort. Probably not coincidentally, Koch Industries has been the target of numerous federal and state environmental enforcement actions, and recently paid the largest civil fine ever imposed for violations of U.S. environmental laws. Operating initially under the name "Citizens for Judicial Review" – and

[12] Unless otherwise noted, this material is drawn from John D. Echeverria, *supra* note 3, at 225-234.

subsequently as the "Economic Judicial Report" – the Oklahoma group created a nationwide franchising operation for pro-business advocacy in state judicial elections.

A 1996 fund-raising letter to various business leaders described the group's original plan. CJR proposed preparing state-by-state evaluations of the voting records of state judges and distributing the results to "pro-business opinion leaders." This project was needed, CJR contended, because "the judiciary has a dramatic and often-overlooked effect on investment and employment decisions made by businesses." The initiative would, among other things, address the problem that some businessmen "are unaware of the negative economic effects which can result from judges who maintain unsound economic ideologies [sic]." The proposal described a budget for the eight-state effort of $1 million, and indicated that "[a]ny additional dollars" above and beyond the $1 million would "go toward funding a $3.5 million national program." The letter predicted that the effort "will have a very significant impact on judicial behavior and create positive cost results in our state, region, and nation." The goal, in short, was to raise money to support political activity in order to change the content of the law and thereby improve conditions for business.

Since its formation, the Oklahoma group has been solely or partly responsible for producing judicial performance reports in at least eight states, including Alabama, Florida, Louisiana, Michigan, Mississippi, Oklahoma, Pennsylvania, and Texas. The reports evaluate judges' "pro-business" performance based on an analysis of how judges have decided a small sampling of cases in different subject areas, including environmental regulation,

employment, insurance, products liability, and so on. The rulings in each category are tabulated to produce an overall pro-business favorability rating, ranging from 100% pro-business to 0%. The evaluations treat judicial rulings as being indistinguishable from legislative votes, ignoring the fact that judges who conscientiously perform their duties may often arrive at results which they do not prefer as a matter of policy. The media in different states has given extensive coverage to these reports, and they have provided the basis for various organizations' decisions about which candidates to endorse.

U.S. Chamber of Commerce.[13] Apparently building upon the work initiated by the Oklahoma group, in 1998 the U.S. Chamber of Commerce formed the Institute for Legal Reform, one of the stated objectives of which is "rating and endorsing highly qualified candidates for judicial elections in certain key states."

An article published in summer 1999 provides a summary of the goals and objectives of the Institute. According to its president, the Institute was created because "[t]he Chamber realized that the business community was concerned" about what he called the "growing threat of abusive, frivolous and excessive litigation." The project had a steering committee made up of corporate leaders, with funding coming from "businesses around the country." The Institute conducts "media campaigns which include press releases, op-ed pieces, letters to the editor,

[13] Unless otherwise noted, this material is drawn from John D. Echeverria, *supra* note 3, at 235-37.

publishes pamphlets, holds conferences and even, on occasion, purchases ad time or space."

In June 2000, in its most ambitious effort yet, the Institute announced a campaign to support the election of "pro-business" judges to the state supreme courts in Alabama, Illinois, Michigan, Mississippi, and Ohio, and indicated that it expected to raise at least $10 million to support the effort. The executive director of the Institute reportedly stated that the Institute intended to use these funds to make direct campaign contributions as well as pay for issue advertising. The Chamber played a major role in the 2000 state judicial races, particularly in Ohio and Mississippi, and has claimed that 12 of its 15 endorsed candidates nationwide were elected.[14]

C. Select Battlefield States.

Three examples of how interest groups have worked to influence the state courts and their decision-making are collected below. *Amici* believe this information is representative of the situation which exists in other states.

Idaho.[15] For many years, judicial selection in Idaho was largely divorced from politics. By custom, the governor appointed many justices after incumbents stepped down. Prior to the 2000 race, no incumbent had been

[14] *See* Deborah Goldberg & Mark Kozlowski, "Constitutional Issues in Disclosure of Interest Group Activities," at 3 n.7, paper prepared for Symposium on Judicial Campaign Conduct and the First Amendment (Chicago, November 9-10, 2001).

[15] Unless otherwise noted, this material is drawn from John D. Echeverria, *supra* note 3, at 238-54.

voted out of office for over fifty years and, therefore, justices faced little real prospect of retribution at the polls for unpopular decisions.

All of that changed, however, with the 2000 race. The primary (but not the only) issue in the campaign was a controversial court ruling, decided by a three to two vote, upholding a claim by the United States to federal "reserved" waters rights in several protected areas on federal public lands in the state. *See In re SRBA*, 1999 WL 778375 (Id. 1999). Justice Cathy Silak, who was up for reelection the following year, was the author of the majority opinion.

An October 14, 1999, editorial in *The Idaho Statesman* set the tone for the election. "Through the hand-wringing over Idaho's water rights," the editorial began, "there is one quick-fix solution available to voters: elect a new Supreme Court Justice." The editorial pointed out that Justice Silak's pending reelection "leaves an opening for anybody who thinks she was in error." "Silak should be aware," the editorial concluded, "that there isn't a single Idaho politician in the last 30-plus years – Democrat or Republican – who would dare to run on the platform to allow the federal government to control every drop of water in designated areas of the state."

A steady torrent of criticism subsequently rained down on Justice Silak. A board member of an irrigation district in southern Idaho said, "this is setting a prec dent that is untenable. We can't live with it. No citizen in the Snake River Plain can live with this decision." A representative of the Farm Bureau Federation said the organization was "astounded with this ruling."

Judge Dan Eismann launched his campaign to unseat Justice Silak by appearing and speaking at a party fundraising banquet. Newspaper accounts of the event indicate that Eismann did not explicitly discuss the water rights case, but it was an implicit focus of the event. At a meeting prior to the banquet, a party official called for Silak's removal, stating: "We anticipate having an opponent for her so you will have a choice . . . In this instance you better get out there and vote or you'll be pretty dry."

In the last few weeks before the election, a South Carolina-based group financed an illegal "push poll" designed to sway voters against Justice Silak based on her opinion in the Snake River case. A push poll, conducted under the guise of "polling" voters, is actually designed to "push" them in favor of a particular candidate. The script of the push poll was as follows:

> "Hello, Mr. XX? This is XXX calling. I'm conducting a brief survey. Can I ask you one question? Do you support the move by the courts to transfer control over Idaho water rights to the federal government?
>
> Residents who answered 'no' were told: 'Your opposition to the federal power grab of Idaho water is important. You see, at the May 23 election, Idaho voters will be deciding who will serve on the state supreme court. The current judge, Cathy Silak, is the person most responsible for handing over Idaho water to the federal agents. Her opponent is Dan Eismann. Judge Eismann opposes this giveaway. He is a solid defender of individual freedom and has a record of being fair and honest.'

> The caller was then asked: 'Can we count on you to go to the polls on Tuesday May 23rd and vote for Dan Eismann for state Supreme Court?' "

Who or what was behind this push poll is a mystery. The poll was nominally sponsored by an organization called Citizens for Term Limits Idaho Campaign. The actual telephoning was conducted by a Pennsylvania-based telemarketing firm. According to a press statement by the leader of the Idaho group, the poll was funded by a $50,000 check from Lyle Coggan of the Democracy Fund in South Carolina. Further details on the nature of the fund or the identity of Mr. Coggan, or the basis for their interest in the Idaho race, have never been publicly disclosed.

On May 23, 2000, Justice Eismann won the Supreme Court seat by defeating Justice Silak in the two-person primary by a margin of 60 to 40.

On October 27, 2000, following Silak's defeat at the polls (but before her term expired), the Court, in response to an application for rehearing of its ruling in the Snake River case, reversed itself. *See Potlatch Corp. v. United States*, 12 P.3d 1260 (Idaho 2000). This time, again by a three to two vote, the Supreme Court concluded that the United States had not established a reserved water right. Chief Justice Trout, who was scheduled to face the voters two years later, in November 2002, switched her vote.

In a recent address,[16] Justice Christine Durham of the Utah Supreme Court stated that she would be "extremely loath" to conclude that either the public criticisms of Justice Silak or the outcome of the election accounted for the change in the law. But, she said: "The point . . . is this: significant publicity and special interest involvement created an inference that the court's work (and its vote on rehearing) was influenced by a judicial election campaign in which the outcome of this case was a major factor."

Louisiana.[17] In Louisiana, the business community has waged an aggressive and quite successful campaign to produce a more "business friendly" state supreme court. Given the importance of petrochemical and related manufacturing in Louisiana, it is hardly surprising that this campaign was driven in significant part by the business community's objections to environmental regulation.

The leader of the campaign is the Louisiana Alliance of Business and Industry ("LABI"). LABI reportedly has played a role in recruiting candidates for the Court and contributed heavily to its favored candidates. During the 1998 race, Chief Justice Calogero charged that his challenger, Judge Cusimano, was "a handpicked candidate of the Louisiana Association of Business and Industry, trying to change the complexion of the Supreme Court." Cusimano received $26,000 from LABI-affiliated PAC's, close to the maximum allowed, and Cusimano described

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[16] Christine Durham, "The Judicial Branch in State Government: Parables of Law, Politics, and Power," 76 N.Y.U.L.Rev. 1601 (2001).

[17] Unless otherwise noted, this material is drawn from John D. Echeverria, *supra* note 3, at 254-69.

himself as a candidate who would bring "a philosophy that understands business" to the Court. LABI prepared at least one judicial evaluation report, in 1998, after the Oklahoma group prepared the initial evaluation report for Louisiana in the 1996 election cycle.

LABI has expressed a clear preference for a merit selection process for state judges but also has been frank about its unwillingness to forego efforts to influence the outcome of the current election process. In the early 1980s, LABI supported legislation to establish a judicial appointment process. Following the failure of the reform legislation, LABI joined the judicial electoral fray. In 1994, the LABI president acknowledged that it was seeking to use its financial power and political clout to influence the Court, stating, "We don't choose to make our judicial system in this state above influence." LABI has contended, "If the Legislature continues to resist some form of merit selection for judges, which is the obvious reform that is needed to insulate judges from the unavoidable influence of special interests, the business community must remain actively involved in the judicial election process."

LABI believes that its activities have "improved" the Supreme Court from a business standpoint. For example, LABI's political director told a reporter that certain recent Supreme Court pro-business rulings "wouldn't have happened as they did" in the absence of LABI's efforts on behalf of certain judicial candidates. At least one celebrated case, the Louisiana Supreme Court's 1997 decision in *Meredith v. Ieyoub*, 700 So.2d 478 (La. 1997), appears to confirm the accuracy of this boast.

The case arose from the decision by the Attorney General to enter into contingent-fee contracts with private firms to assist the State in prosecuting environmental damage claims against polluters. The Attorney General's apparent motivation in entering into these contracts was to enlist the resources and expertise of private law firms in helping the State to enforce the environmental laws. The state association of oil and gas producers and some of its members, who were among the potential targets of litigation under this arrangement, brought suit claiming that the Attorney General lacked the legal authority to enter into this type of contract.

There is strong evidence that the plaintiffs' ultimate success in this litigation is attributable to the business community's successful efforts to elect more "pro-business" justices to the Supreme Court. While the case was pending in the lower courts, LABI and other business groups succeeded in electing two "business friendly" justices to the Court. In its decision handed down in September 1997, the Court ruled, by a 4 to 3 vote, that the contracts were illegal. Justice Victory, who was elected in 1994, with business backing, wrote the majority opinion, which was joined by three other justices, including the two other business friendly justices elected in 1996. The Chief Justice and two other relatively long-time members of the Court dissented. While it is impossible to know how the case would have turned out otherwise, it is reasonable to infer that the outcome in *Meredith v. Ieyoub* was determined by effective political advocacy.

In recent years, Louisiana judicial elections have reached extraordinary heights of partisan viciousness. The 1998 campaign was described in the press as "nasty,

expensive" and "without respite" and full of "biting television ads and a sea of glossy campaign posters." Independent candidate Bill Quigley suggested that his opponents' resources would be better spent in buying television time for a public discussion of the issues rather than in purchasing ads which "demean" the office and make the campaign "like the Jerry Springer show." Not surprisingly, a 1998 survey conducted by the University of New Orleans found that 80 percent of state residents surveyed thought the Louisiana Supreme Court was too influenced by politics.

Ohio.[18] The unsuccessful effort to unseat Justice Alice Resnick from the Ohio Supreme Court in November 2000 illustrates the extraordinary size of third-party investments in efforts to influence state judicial elections.

For nearly a decade, the Ohio Chamber of Commerce and other groups have waged a concerted campaign to alter the ideological balance on the sharply divided Ohio Supreme Court. The Ohio Chamber of Commerce actually published the first judicial evaluation report, in the mid-1990's, apparently providing the model for the Oklahoma group's subsequent nationwide organizing effort discussed above.

In the November 2000 race, the campaign focused on an effort to oust long-term incumbent Justice Resnick. The Chamber's judicial evaluation report assigned Resnick the lowest "pro-business" score of any justice on

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[18] Unless otherwise noted, this material is drawn from John D. Echeverria, *supra* note 3, at 287-300.

the court, and also assigned her the lowest pro-business voting record in environmental cases specifically.

The Chamber rhetoric leading up to the campaign suggests the importance of the effort to unseat Resnick to business interests. The Chamber's 2000 judicial evaluation report stated that "[b]usiness leaders need to realize that as Ohio enters the 21st century, the anti-business tilt of the Ohio Supreme Court presents one of the biggest challenges to the state's business climate. . . . The state's legal climate has become a negative factor for businesses considering new or expanded operations in Ohio."

Citizens for a Strong Ohio, an arm of the Ohio Chamber of Commerce, and the U.S. Chamber of Commerce's Institute for Legal Reform, spent a reported $5 million in advertising attacking Justice Resnick, but refused to disclose the identity of their contributors. The harshest anti-Resnick ad featured a statute of lady justice peeking under her blindfold at bundles of money, with an announcer intoning that Justice Resnick had received $750,000 in campaign contributions from the trial lawyers since 1994 – and voted in their favor 70% of the time. The ad concluded by asking: "Is justice for sale in Ohio?" The backers of this expensive advertising campaign evidently thought the answer to their question was clearly "yes."

II. The Highly Politicized Nature of State Judicial Elections Undermines the Possible Effectiveness of Rules Limiting Speech and Other Political Activity of Judicial Candidates.

While *amici* take no position on the First Amendment issues in this case, the evidence discussed above concerning politicization of the state courts may nonetheless be relevant to the Court's resolution of these issues. Restrictions on speech and other political activity are permissible only if they serve a "compelling" government purpose. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 228-29 (1989). Furthermore, the restrictions must be "narrowly tailored" to use the "least restrictive means" to achieve the stated goal. *Burson v. Freeman*, 504 U.S. 191, 198 (1992). While protecting the independence and impartiality of the judiciary is unquestionably a compelling purpose, it is questionable whether Canon 5 can meet the stringent standards of the First Amendment.

First, starting at the most basic level, the restrictions arguably cannot serve to protect judicial independence and impartiality because they cannot alter the basic nature of the electoral process itself. The very purpose of popular elections is to ensure that elected officials will be responsive to the citizenry. Political responsiveness is the antithesis of independence. In other words, in a fundamental sense, an independent and impartial elected court is an oxymoron, and efforts to limit the speech and other political activity of judicial candidates cannot alter that conclusion.

To be sure, no judge, regardless of the method of his or her selection, is completely free of any chimera of political or ideological taint. A litigant can often evaluate from a judge's past professional activities, volunteer work, legal writings, and so on whether a judge is likely to be sympathetic to a particular legal position. Even under a merit-appointment system, it would be naive to suppose that elected officials who select and review nominees are not influenced by a candidate's judicial philosophy and their general sense of how a candidate will approach certain legal issues. The judicial branch cannot be divorced from the political process.

But, within this basic constraint, it makes all the difference in the world whether a judge must periodically run for election – and, perhaps most importantly, run for reelection – in order to serve. Every judicial election places at risk for a judge both the prestige and salary associated with judicial office. As a matter of common sense, judicial rulings likely to offend a significant portion of the electorate, or some well-heeled special interest, will place a judge's job at greater risk. Judicial opinions which are popular and inoffensive to powerful special interests will help enhance job security. It would contradict everything we know and expect of the electoral process to think that elected judges could entirely ignore such considerations.

Second, Canon 5 and similar restrictions are likely ineffective because, even if the political aspects of state judicial elections might be controllable in theory, the reality is that judicial elections are intensely political contests in all if not most states which hold such elections. Special

interests now make large contributions to judicial campaigns and help finance "independent expenditure" activity. The involvement of independent groups in the electoral process is particularly significant because, under governing constitutional standards, mandatory limits cannot be imposed on spending by such groups, *see Buckley v. Valeo*, 424 U.S. 1, 35-39 (1976) (per curiam), and, depending upon the nature of the groups' advocacy, it may be impossible even to require public disclosure of their financial contributors. *See id.* at 79-80. As discussed in section I, prominent players in judicial electoral politics have publicly announced that the purpose of their political advocacy is to change the law. There also is evidence that in some cases special interests have succeeded in these efforts, either by directly changing the ideological complexion of a court's membership or by implicitly threatening sitting judges with retribution at the polls if they rule the "wrong" way. The results of public surveys indicate that the public understands what common sense suggests: the goal of independent and impartial courts has already been severely compromised in some states.

The record in this case appears to indicate that in Minnesota in particular, as in other states, special interest involvement in judicial elections already has seriously eroded the independence and impartiality of the courts. A variety of "quasi-political organizations" are involved in Minnesota judicial politics, including state and local bar associations, the League of Women Voters, "People for Responsible Government," Minnesota Women Lawyers, Lavender Magazine, and Minnesota Family Council. *See Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 901

(8th Cir. 2001) (Beam, J., dissenting). As stated by Judge Beam, "such groups can easily bring pressure to bear in judicial elections." *Ibid.*

Finally, even it could be concluded that Canon 5 and similar restrictions help serve to protect judicial independence and impartiality, in Minnesota and/or in other states, it is also debatable whether such restrictions represent the "least restrictive means" for achieving the state's objective, as required by the First Amendment. The State of Minnesota could eliminate judicial elections and select judges through a "merit appointment" process instead. A number of states have adopted this approach, and it has proven to be a stable and workable method for judicial selection. The federal government has, of course, avoided the need for considering similar restrictions of judges' speech, because Article III judges are appointed by the President subject to the concurrence of the U.S. Senate.[19]

Merit appointment, by removing the judiciary from politics to the maximum extent possible, would protect the independence and impartiality of the Minnesota courts far more effectively and comprehensively than

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[19] While the strict "compelling government purpose" and "least restrictive means" tests apply to direct restrictions on speech, the same tests do not necessarily apply to all types of legal controls on the state judicial electoral process. *Cf. Buckley v. Valeo*, 424 U.S. 1, 21-22 (1976) (discussing the relatively more deferential standard applied to limits on campaign contributions, as compared to campaign expenditures). In particular, *amici* do not believe that the availability of the merit-selection option necessarily bars limits on contributions to judicial candidates or third-party entities, or precludes strict public reporting of contributions and expenditures.

Canon 5. At the same time, removing the judicial selection process from the electoral process would eliminate the need to seek to restrict First Amendment freedoms. In general, Minnesota and other states have broad latitude in designing their own forms of government. However, at least for the purpose of evaluating this First Amendment claim, it is certainly relevant that there is a widely accepted and well-tested alternative method of judicial selection which promotes judicial independence and impartiality without the need to restrict speech under the First Amendment.

III. State Judicial Election Procedures Violate Litigants' Rights Under the Due Process Clause to Have Their Cases Heard by Fair and Impartial Courts.

Amici submit that the fundamental issue raised by the politicization of the state court systems is whether litigants are being denied their rights to fair and impartial courts under the Due Process Clause of the Fourteenth Amendment. If so, then the entire system of judicial administration in some states may be subject to constitutional challenge under the Due Process Clause. *But cf. Public Citizen, Inc. v. Bomer*, 115 F.Supp.2d 743 (W.D.Tex. 2000), *aff'd on other grounds in an unreported decision*, ___ F.3d ___ (5th Cir. 2001) (dismissing on jurisdictional grounds broad constitutional challenge to Texas system for electing state judges). At a minimum, the current situation creates the prospect of legal challenges to specific court decisions on the grounds that the state courts have not supplied the reality, or at least the appearance, of impartial justice.

"The Due Process Clause entitles a person an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jericho*, 446 U.S. 238, 242 (1980). This "jealously guarded" protection is designed both to avoid "unjustified or mistaken deprivations," *id.*, as well as to "preserve the appearance and the reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done.' " *Id.*, quoting *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123 (1951) (Frankfurter, J.). The Court, in a recent articulation of the applicable test, stated that, "[b]efore one may be deprived of a protected interest . . . , one is entitled as a matter of due process of law to an adjudicator who is not in a situation which would offer a possible temptation to the average man as a judge . . . which might lead him to not to hold the balance nice, clear, and true." *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 617 (1993) (internal citations omitted). The Court has repeatedly applied this rule to bar the participation of judges in cases in which the court's impartiality could reasonably be questioned. *See, e.g., Aetna Life Insurance Co. v. LaVoie*, 475 U.S. 813 (1986); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

The Court has frequently emphasized that the Due Process Clause is offended, not only by the reality but also by the appearance of impartiality. "Indeed, justice must satisfy the appearance of justice, and this stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Marshall*, 446 U.S. at 242. *See also Aetna*, 475 U.S. at 825 ("mak[ing] clear that we are not required to decide

whether in fact [the judge] was influenced, but only whether sitting on the case . . . would offer a possible temptation to the average . . . judge to . . . lead him to not to hold the balance nice, clear, and true").

The current, increasingly politicized system of judicial selection raises a host of due process concerns. Large campaign contributions by lawyers and private firms and individuals, as well as "independent" expenditures designed to support a particular candidate, raise obvious and serious questions about whether a judge will feel beholden to supporters whose interests may be affected by a pending case. In addition, a judge presiding over a case involving past campaign contributors might feel pressure to rule in a fashion that maximizes the chances of receiving contributions for the next election cycle. On the other hand, as the example of the Idaho Supreme Court arguably illustrates, a judge might be influenced by a desire to avoid being targeted by a specific constituency which might object to some ruling. As discussed, the constitutional test turns not only on the reality of improper influence but on the "appearance" of impropriety. As stated by Justice Kennedy, the increasing "scramble" to finance state judicial elections raises the concern "that there will be either the perception, or the reality, that judicial independence is undermined."[20]

Amici recognize that removing restrictions on judicial candidates' speech and political activities could make existing, already serious due process problems even more

[20] Frontline, Justice for Sale (PBS television broadcast, November 23, 1999).

serious. Once an elected judge or candidate has committed to a particular public position on a legal issue, he or she may feel an obligation to stick to that position, undermining a litigant's right to an impartial hearing. On the other hand, if a judge departed from a previously stated position, he or she might be called to account by the voters. Just as the electorate has punished elected officials who failed to fulfill pledges of "no new taxes," the electorate might toss from office judges perceived as having broken pledges to "punish criminals," or "protect human life," and so on.[21] The dilemma of attempting to navigate between First Amendment concerns and due process problems can be resolved most directly through adoption of merit selection procedures.

The Court has not specifically addressed the point at which campaign contributions and other political activities in state judicial elections so undermine the fair administration of justice that they rise to the level of a due process violation. To date, lower federal and state courts have been reluctant to entertain such challenges. *See, e.g., Shepherdson v. Nigro*, 5 F.Supp.2d 305 (E.D. Penn., 1988) (rejecting due process challenge to state court dismissal of plaintiff's claim when court received over $20,000 in campaign contributions from the defendant's

[21] On the other hand, it could be contended that eliminating Canon 5 and similar restrictions might help protect the independence, if not necessarily the impartiality, of the courts and thereby help serve due process values. If judges and judicial candidates could speak more freely, they could at least speak out to counter misleading or unfair criticisms of their views.

law firm). The reasons offered for not entertaining such claims are not convincing.

First, it has been suggested that because "it is the public which supports, or tolerates the election of state judges . . . , [i]t is unrealistic and unfair to require that judges run for election and then deride them for accepting the money that is necessary to sustain a campaign from a principal source." *Id.* at 310. State judges cannot, of course, be faulted for operating within the constraints imposed by a state's judicial selection process. In the context of a due process case, however, the issue is whether the litigant has been deprived of his or her constitutional right to an impartial tribunal. That state judges deserve no individual blame for the constitutional infirmities of the state court systems is not a valid reason for ignoring such infirmities.

Second, it has been suggested that requiring judges to routinely recuse themselves in cases involving lawyers or litigants who contributed to their campaigns would require judges to recuse themselves in many if not most of their cases. *See, e.g., Roe v. Mobile County Appointment Board*, 676 So.2d 1206, 1233 (Ala. 1995). It is debatable whether a modest campaign contribution, in the absence of any other consideration, should be sufficient to support a finding of a due process violation. On the other hand, it is certainly true that judicial recognition that campaign contributions implicate due process concerns may cast a constitutional shadow upon many state court systems. The magnitude of the due process problems created by state judicial elections is hardly a legitimate argument for sweeping the due process concerns under the rug.

Finally, it has been suggested that "constitutionalizing" state judicial selection procedures would require federal courts "to engage in the type of policy making more appropriately undertaken by pertinent state authorities," and, therefore, the federal courts should defer to "the state authorities responsible for adopting and interpreting codes of judicial conduct or the highest courts in the states." *Shepherdson*, 5 F.Supp.2d at 10-11. The short answer to this argument is that the state courts are not exempt from the requirements of the Fourteenth Amendment. In the past, the Court has not hesitated to declare that specific state court decisions, *see, e.g., Aetna Life Insurance Co. v. Lavoie, supra,* or even that widespread judicial institutional arrangements, *see, e.g., Ward v. Village of Monroeville*, 409 U.S. 57; *id.* at 62 (Rehnquist, J., dissenting), violate the Due Process Clause.

In the absence of appropriate supervision by this Court of state judicial elections under the Due Process Clause, the dismal future of the state courts is easy to foretell. The major interest groups already invested in these electoral contests will be joined by numerous other groups. Judges seeking reelection will be routinely rated by abortion rights and anti-abortion groups, consumer advocates, environmentalists, libertarians, and so on. Just as no self-respecting lobby organization can afford not to be represented at the state legislature, no significant interest group will be able or willing to sit out state judicial elections.

Over time, the nature of many state judiciaries will be utterly transformed. Rather than being essentially judicial bodies, the state courts will take on the characteristics of a legislative forum. The composition of the

elected state courts, as well as their decisions, will reflect the same balance of competing political forces reflected in the voters' choice for governor and state legislature. When litigants lose important, controversial cases, they will properly surmise it was because their side of the argument lost at the ballot box, not because an impartial evaluation of the facts or the law dictated any particular outcome. The ideal of the courts as protectors of the unpopular and the powerless within our society will be lost, and the fair administration of justice and the protection of liberty will be destroyed.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to decide this case in light of the broader problem of the politicization of the state court systems, including the serious questions about whether litigants are being denied their due process rights to fair and impartial courts.

Respectfully submitted,

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APPENDIX

Idaho Conservation League ("ICL") is an Idaho non-profit membership conservation organization. ICL and its approximately 2,800 members are dedicated to protecting and conserving Idaho's natural resources, including its wildlife resources. ICL's mission is to "protect and restore the clean water, wildlands, and wildlife of Idaho." ICL has worked to protect water resources in Idaho, including by attempting to intervene in the Snake River Basin Adjudication proceeding over federal reserved water rights in wilderness areas which was the focus of the electoral contest leading to the defeat of Justice Silak. ICL also has participated as an intervenor in other aspects of the Snake River Basin Adjudication proceeding.

The Louisiana Environmental Action Network (LEAN) is a statewide coalition of grassroots and community organizations dedicated to making Louisiana's communities safer, healthier places to live. Major LEAN projects focus on controlling water pollution, reducing toxic air emissions, and improving the safety of pesticides. LEAN has closely monitored political efforts to influence the Louisiana Supreme Court on environmental and other issues.